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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. VONCHERIO JAMAL GRISBY, Defendant and Appellant.	A153497 (Contra Costa County Super. Ct. No. 05-171484-9)

Defendant Voncherio Grisby was sentenced to 11 years and four months in prison after a jury convicted him of four felonies based on his involvement in drug sales, including one count of possession for sale of cocaine base with an accompanying enhancement for being personally armed with a firearm during the offense and one count of possession of a controlled substance while armed with a loaded operable firearm. On appeal, his sole claim is that both the firearm enhancement and the latter conviction must be reversed because there is no substantial evidence that he had ready access to the handgun at issue. We disagree, modify the judgment to correct minor sentencing-related errors, and affirm.

I.
FACTUAL AND PROCEDURAL BACKGROUND

In the spring of 2017, a narcotics detective began investigating Grisby for selling drugs in a Richmond neighborhood. The detective observed Grisby make several quick contacts with people who then left the area, which led the detective to suspect that these

interactions were "narcotic transactions." On at least one occasion, the detective also saw Grisby clutching a "bulge" at his waistband that the detective suspected was a firearm. Having seen Grisby travel between two residences in the area "multiple times per day," the detective eventually obtained a search warrant for each address in early August.

At around 6:00 a.m. on August 3, 2017, the detective and a team of other officers executed the search warrant on one of the addresses. They knocked and loudly announced their presence and demanded entry, at which point the detective saw people walking around inside near a hallway. The police continued demanding entry, "raked" the exterior screen door to open it, and set off a "flash bang."

Approximately 60 to 90 seconds after the officers first announced themselves, Grisby "poked his head around the hallway wall" and indicated he was coming out. He was arrested, at which point he told the detective he was " 'a career criminal' " and believed " 'snitches' " had informed the police that drug sales were being conducted out of the residence. Several other people were also at the house, including the woman who rented it, two other women, and five children ranging in age from 1 to 17 years old.

The house had two bedrooms in its northern portion and, moving south along the hallway, a bathroom, a third bedroom, and a second bathroom on the house's southern side. The south bathroom was the only room in the house from which one could enter the garage. The garage, which had two couches and appeared to be used as "[l]iving quarters," contained clothes, shoes in Grisby's size, Grisby's keys, and documents with Grisby's name on them.

One gram of cocaine base was found in each of three locations: the north bathroom, in which the toilet had recently been flushed; the third bedroom, and the staircase leading from the garage to the south bathroom. In addition, a plastic bag containing approximately seven grams of cocaine base in 15 "individually wrapped baggies" was found between the cushions on one of the couches in the garage. Other paraphernalia associated with the sale of cocaine base was also found in the garage, including baking soda, two digital scales, and razor blades. Testifying as an expert

witness, the detective opined that the cocaine base found in the garage was possessed for sale.

The police also located a Glock .40 caliber semiautomatic pistol in a garbage can in the south bathroom, covered by a shirt. The Glock was in operable condition and loaded with 14 rounds of ammunition, one in the chamber and the remainder in a high-capacity magazine. A gun holster that could fit the Glock was on the floor of the south bathroom, and an empty gun case was on the garage floor near the staircase. In addition, a high-capacity "drum" magazine containing 47 rounds of ammunition similar to that in the Glock's magazine was on one of the couches in the garage. Grisby's DNA was found on the Glock's trigger and front sight, the latter location suggesting Grisby could have carried the gun at his waistband.

While being interrogated, Grisby admitted that he lived in the garage and dealt cocaine base in the neighborhood. Although he denied that the Glock or the drum magazine belonged to him, he suggested that guns were easy to steal or obtain on the street, referred to his need to defend himself because he was a drug dealer and had been shot at before, and, as paraphrased by the interrogating officer, indicated he needed a large-capacity magazine "to fight back against his rivals," who "operate in a crew," because "he's just one person."

Grisby was charged with one count of possession for sale of cocaine base, one count of possession of a controlled substance while armed with a loaded operable firearm, one count of possession of a firearm by a convicted felon, and one count of receiving a large-capacity magazine.[1] The information also alleged that Grisby was personally armed with a firearm during the possession-for-sale offense and had a 2002

[1] The charges were brought under Health and Safety Code sections 11351.5 (possession for sale) and 11370.1, subdivision (a) (possession of controlled substance while armed) and Penal Code sections 29900, subdivision (a)(1) (possession of firearm by felon) and 32310, subdivision (a) (receiving large-capacity magazine). All further statutory references are to the Health and Safety Code unless otherwise noted.

conviction for second degree robbery, a strike.[2] The jury convicted him of all four counts and found true the personal-arming allegation, and the trial court found true the strike allegation.

The trial court sentenced Grisby to a total term of 11 years and four months in prison, composed of a term of six years for possession for sale of cocaine base and consecutive terms of four years for the accompanying firearm enhancement and one year and four months for receiving the large-capacity magazine. A two-year term for possession of a firearm by a felon and a concurrent three-year term for possession of a controlled substance while armed were imposed and stayed.

II.
DISCUSSION

A. Sufficient Evidence Supports the Challenged Enhancement and Conviction.

Grisby argues that there is insufficient evidence to support either the personal-arming enhancement attached to his possession-for-sale conviction or his conviction for possession of a controlled substance while armed. To evaluate this claim, " 'we review the whole record to determine whether . . . [there is] substantial evidence to support the verdict . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence.' " (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

Under Penal Code section 12022, subdivision (c), "a person who is personally armed with a firearm in the commission of a violation or attempted violation of" various provisions of the Health and Safety Code, including section 11351.5 prohibiting the possession of cocaine base for sale, "shall be punished by an additional and consecutive term of imprisonment . . . for three, four, or five years." A defendant is "personally

[2] The personal-arming allegation was made under Penal Code section 12022, subdivision (c), and the strike allegation was made under Penal Code sections 667, subdivisions (d) and (e) and 1170.12, subdivisions (b) and (c).

armed" under this statute if he or she, as opposed to an accomplice, "has the specified weapon available for use, either offensively or defensively." (*People v. Bland* (1995) 10 Cal.4th 991, 996-998 & fn. 3 (*Bland*).) To establish this enhancement, the prosecution had to prove that while in possession of cocaine base for sale, Grisby knowingly had a firearm available for use. (See *id.* at p. 997; *People v. Singh* (2004) 119 Cal.App.4th 905, 912; CALCRIM No. 3131.)

Under section 11370.1, subdivision (a), "every person who unlawfully possesses any amount of a substance containing cocaine base . . . while armed with a loaded, operable firearm is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years." The statute defines "armed with" to mean "having available for immediate offensive or defensive use." (§ 11370.1, subd. (a).) To establish this offense, the prosecution had to prove that while in possession of cocaine base, Grisby knowingly had a loaded, operable firearm ready for immediate use. (See *People v. Singh*, *supra*, 119 Cal.App.4th at p. 912; CALCRIM No. 2303.)

Although the proof required for the enhancement and the proof required for the offense at issue are similar, they are not identical. The primary differences are in the amount of cocaine base possessed (an amount for sale versus a usable amount) and the characteristics of the weapon (any firearm versus a loaded, operable firearm). These differences do not matter here, as Grisby concedes the Glock was a "loaded, operable firearm" and there was sufficient evidence that he possessed cocaine base for sale, based on the seven grams of the drug found in the garage. Rather, the crux of his claim is that the evidence did not establish he had sufficient access to the gun to support either the enhancement or the offense.

The Attorney General argues that the availability of the firearm (for "use" versus for "immediate use") is another relevant distinction between the proof required for the enhancement and the proof required for the offense. But while section 11370.1, subdivision (a) does use the word "immediate" and Penal Code section 12022, subdivision (c) does not, *Bland* suggests the distinction has no substantive import. In that case, the Supreme Court addressed what it meant to be armed during the commission of a

drug offense under section 12022. (*Bland*, *supra*, 10 Cal.4th at p. 999.) "[W]hen the prosecution has proved a charge of felony drug possession, and the evidence at trial shows that a firearm was found in close proximity to the illegal drugs in a place frequented by the defendant, a jury may reasonably infer . . . that, at some point during the period of illegal drug possession, the defendant was present with both the drugs and the firearm and thus that the firearm was available for the defendant to put to *immediate* use to aid in the drug possession." (*Id.* at pp. 1002-1003, italics added.) Given this language, we will assume that both the enhancement and the offense required the Glock to be available for Grisby's immediate use.

Grisby argues that he did not have sufficient access to the Glock because, "in order to gain access to [it, he] needed to leave his garage room, go to the bathroom, reach into the trash can, [and] lift the clothing and plastic, revealing the gun." In support, he cites numerous cases that affirmed a defendant was armed "where the firearm was more readily available to the defendant than the firearm in this case was to [him]." These cases are of little use in determining where to draw the line between sufficient and insufficient evidence of access to a firearm.

Grisby also cites *People v. Peña* (1999) 74 Cal.App.4th 1078, which held that a defendant was not in "immediate personal possession" of a firearm under section 11550, subdivision (e) where the firearm was in a toolbox in the bed of the truck in which he was pulled over. (*Peña*, at p. 1080.) That statute, which criminalizes possessing a firearm while under the influence of a controlled substance, specifically defines "immediate personal possession" to include "the interior passenger compartment of a motor vehicle." (§ 11550, subd. (e)(2).) The *Peña* defendant argued that the statute did not cover the possession of firearms outside the passenger compartment, and the People argued that it covered actual possession of firearms "readily available for offensive or defensive use." (*Peña*, at p. 1087.) After observing that the issue was "a close call" and reviewing the policy considerations supporting both positions, the appellate court applied the rule of lenity to hold that the statute did not cover firearms inside a defendant's vehicle unless they were in the passenger compartment. (*Id.* at pp. 1087-1088.)

Peña does not support Grisby's position. Grisby claims that the decision "based its holding in part on how easily and quickly a person can retrieve and use the firearm against a police officer" and that the risk to law enforcement in this case was likewise "diminished" since the Glock "was located in a different room, hidden under clothing and other items in a trash can." But *Pena* addressed statutory language and legislative intent specific to firearms in vehicles, and we do not see how the location of the Glock can be logically analogized to that context. In particular, we cannot say that a firearm is categorically unavailable for a defendant's immediate use unless it is in the same room.

In any case, Grisby fails to grapple with the principle that "[d]rug possession is . . . a 'continuing' offense, one that extends through time. Thus, throughout the entire time the defendant asserts dominion and control over illegal drugs, the defendant is criminally liable for the drug possession." (*Bland, supra,* 10 Cal.4th at p. 999.) In other words, we may uphold the enhancement and offense at issue so long as there was sufficient evidence to support the inference that Grisby had the Glock available for immediate use at some point during his possession of the seven grams of cocaine base.

In arguing that it was speculative to conclude he possessed the Glock, Grisby relies on the evidence that it "could have been possessed, hidden[,] and accessed by multiple individuals besides [him]" who had access to the south bathroom. He also cites personal indicia found in the garage that suggested other adults in the house had access to that space as well. The question is not, however, whether the evidence *compelled* the finding that Grisby had the Glock immediately available for use in the course of possessing drugs but whether the evidence reasonably permitted that finding.

We conclude that the evidence here amply supported such an inference. The Glock had Grisby's DNA on it. A drum magazine containing the same type of ammunition as that in the Glock and a gun case were both found in the garage, where the seven grams of cocaine base was hidden and where Grisby admitted he lived. In addition, the gun was found along with a discarded holster in the south bathroom, a room he would have had to travel through to answer the front door. And Grisby made several statements to the police suggesting that he needed significant firepower to protect himself

from other drug dealers. Taken as a whole, this evidence was sufficient to allow a reasonable jury to infer that Grisby was armed with the Glock within the meaning of section 11370.1, subdivision (a) and Penal Code section 12022, subdivision (c) in the course of his possession of the seven grams of cocaine base.

B. Certain Minor Sentencing-related Errors Require Correction.

The abstract of judgment reflects that the trial court failed to impose all of the required penalty assessments on the charges it levied against Grisby under sections 11372.5, subdivision (a) and 11372.7, subdivision (a). In general, we may correct such errors on appeal despite the parties' failure to raise the issue. (See *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1157.)

The trial court imposed "a drug lab fee of $190 and a drug program fee of $570," neither of which is reflected on the abstract of judgment. A court is required to impose a $50 "criminal laboratory analysis fee" on any defendant convicted of certain violations of the Health and Safety Code, including section 11351.5. (§ 11372.5, subd. (a).) In addition, subject to a defendant's ability to pay, a court must impose "a drug program fee" of no more than $150 for any conviction under the Health and Safety Code. (§ 11372.7, subds. (a) & (b).)

In turn, the charges imposed here under sections 11372.5 and 11372.7 were subject to seven mandatory penalty assessments: (1) the 100 percent state penalty under Penal Code section 1464, subdivision (a)(1); (2) the 20 percent state surcharge under Penal Code section 1465.7, subdivision (a); (3) the 50 percent court-construction penalty under Government Code section 70372, subdivision (a)(1); (4) the 70 percent county penalty under Government Code section 76000, subdivision (a)(1); (5) the 20 percent emergency medical services penalty under Government Code section 76000.5, subdivision (a)(1); (6) the 10 percent Proposition 69 DNA penalty under Government Code section 76104.6, subdivision (a)(1); and (7) the 40 percent state-only DNA penalty under Government Code section 76104.7, subdivision (a). All together, these assessments increase the charges to which they apply by a total of 310 percent.

Thus, for the crime-lab fee, penalty assessments should have been imposed in the amount of $155 (310 percent of $50), for a total of $205, not $190. And for the drug-program fee, penalty assessments should have been imposed in the amount of $465 (310 percent of $150), for a total of $615, not $570. Therefore, we modify the judgment to impose the additional increments and direct the preparation of an amended abstract of judgment "list[ing] the amount and statutory basis for each base fine and the amount and statutory basis for each penalty assessment." (*People v. Hamed* (2013) 221 Cal.App.4th 928, 940.)

We recognize there is a difference of opinion as to the proper course when, as in the case of the drug-program fee here, "a fine has an ability to pay provision, and . . . the reviewing court imposes penalty assessments greater than what was originally imposed." (*People v. Johnson* (2015) 234 Cal.App.4th 1432, 1458.) Some cases have determined that "the matter should be remanded to the trial court for a determination of whether the defendant has the ability to pay the newly imposed amount," whereas others have declined to do so " 'absent any indication that [the defendant] lacks the ability to pay,' particularly if the increased amount is minimal." (*Ibid.*, quoting *People v. Knightbent* (2010) 186 Cal.App.4th 1105, 1112-1113.) Here, since Grisby has never challenged his ability to pay the drug-program fee and our disposition increases the assessments on it by only $45, we conclude that "neither justice nor common sense justifies further expense to conduct a hearing on [his] ability to pay." (*Knightbent*, at p. 1112.)

Finally, we note that the abstract of judgment incorrectly reflects that Grisby received the lower term, not the midterm, for receiving a large-capacity magazine. We also order this clerical error to be corrected.

III.
DISPOSITION

The judgment is modified to order Grisby to pay a total of $155 in penalty assessments on the $50 charge under Health and Safety Code section 11372.5, subdivision (a) and $465 in penalty assessments on the $150 charge under Health and Safety Code section 11372.7, subdivision (a). As modified, the judgment is affirmed.

The trial court shall direct that the abstract of judgment be corrected to reflect (1) the fact that Grisby was sentenced to the midterm for receiving a large-capacity magazine and (2) the amount of and statutory basis for both fees and each penalty assessment set forth above. The court shall also ensure that a copy of the amended abstract is sent to the Department of Corrections and Rehabilitation.

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Humes, P.J.

WE CONCUR:

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Margulies, J.

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Sanchez, J.

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